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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LADRAKEOUS SONNY DEAN, Defendant and Appellant.	A142658 (Marin County Super. Ct. No. SC183421A)

Appellant Ladrakeous Sonny Dean was convicted, following a jury trial, of attempted murder and assault with a semiautomatic firearm. The jury also found true great bodily injury and firearm use allegations. On appeal, appellant contends (1) the trial court abused its discretion and violated his constitutional rights to an impartial jury and due process when it denied his petition for juror identifying information to investigate a motion for new trial; (2) the evidence of intent to kill was insufficient to support his conviction for attempted murder; and (3) the trial court abused its discretion when it denied his motion to dismiss a prior strike conviction. We shall affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by amended information with attempted murder (Pen. Code, §§ 664/187, subd. (a)—count 1),[1] and assault with a semiautomatic firearm (§ 245, subd. (b)—count 2). The information alleged, as to both counts, that the offenses were

[1] All further statutory references are to the Penal Code unless otherwise indicated.

serious and violent felonies (§§ 1192.7, subd. (c)(9), 667.5, subd. (c)(12), 1170.12, subds. (a)-(c)); that appellant personally inflicted great bodily injury on the victim (§ 12022.7, subd (a)); and that appellant intentionally and personally discharged a firearm (§ 12022.53, subds. (c) & (g)). The information further alleged, as to both counts, that appellant had suffered three prior convictions and served prior prison terms. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), 667.5, subd. (b).)

Following a jury trial, the jury found appellant guilty as charged and found true the great bodily injury and firearm use allegations. Following a court trial on the prior conviction allegations, the trial court found true the prior conviction and prior prison term allegations.

On July 22, 2014, the trial court sentenced appellant to 47 years in state prison.

On July 25, 2014, appellant filed a notice of appeal.

FACTUAL BACKGROUND

This case arises from the shooting of Khiry Jefferson[2] at the San Rafael Transit Center (transit center) on December 14, 2012.

Ted Van Midde testified that, on December 14, 2012, he was parked next to the transit center when he heard two loud gunshots. A few seconds later, he saw a tall African-American man wearing all black clothing, including a wool cap, walk quickly across the street to a gold Buick. The man opened the back door of the car and put something in the back seat. Midde had also seen the man park the car and walk across the street a few minutes earlier, one to two minutes before he heard the gunshots. After the man returned to the gold Buick, Midde saw an older African-American woman cross the street and talk to him; the man stared at her, but did not say anything. The man then got into the car and drove away. Midde wrote down the license plate number of the gold Buick. He identified the man, the older woman, and the car he had seen in a video the

[2] Jefferson invoked his Fifth Amendment right against self-incrimination and did not testify at trial.

prosecutor played during trial. He also identified appellant at trial as the man who drove the gold Buick that day.

Philip Boland testified that he was waiting for an airport bus at the transit center when he heard at least two gunshots about 15 or 20 yards away. He then saw a person who appeared to have been shot in the groin and was bleeding. He also saw a man holding a gun in his hand run to "a gold-ish color sedan and speed off." The man with the gun was at least six feet one inch tall and was wearing baggy clothes and a knit cap.

Travoy Meeks testified that he had known appellant since 2003 or 2004 when they were at youth camp together for more than a year. The victim, Khiry Jefferson, is Meeks's cousin. On the day of the shooting, Meeks went to the transit center, where he ran into Jefferson and another man named Omari. As he waited for his bus, Meeks talked with Jefferson and Omari. About 20 minutes after he arrived at the transit center, while he was talking to another acquaintance, Meeks saw appellant walk up, pull out a pistol, and shoot Jefferson. Appellant seemed to be aiming the gun at Jefferson, whom he shot from three to five feet away. Meeks heard no words exchanged between the two men. Appellant was dressed in black, including a black hat. After appellant shot Jefferson, Meeks saw him jump into a gold Buick Regal that was parked in back of the transit center and speed off. Meeks carried Jefferson to a bench, where he saw that Jefferson had been shot in the leg and arm.

Three or four months earlier, appellant had approached Meeks and asked him where Jefferson was. Appellant said to tell Jefferson that appellant needed to talk to him. Meeks said, "You tell him. Don't put me in you guys's mess . . . ."

Shameka Davis, a Golden Gate Transit bus driver, testified that she had arrived at the transit center shortly before starting her shift when she heard gunshots. She turned and saw a man fall and also saw a tall person "with their hand up and running backwards." There seemed to be smoke coming from the raised hand. Davis ran to her car and called "dispatch" to report the shooting. She then saw an African-American man run past her car, with a woman trailing him, saying " 'Drake, Drake, what did you just

do?' "[3] Davis recognized the man as appellant and the woman following him as his mother, Kaiser Alexander. Davis knew appellant and his family from growing up together in Marin City. She saw his mother at the transit center about five days a week. The person she saw running past her car—appellant—was the same person she had seen earlier with his arm up. Davis saw appellant run to a gold car, with his mother running behind him. She then saw him pause briefly before jumping inside the car and driving off.[4]

An audio recording of Davis's call to Golden Gate dispatch was played for the jury, as was a surveillance video recording, which showed Davis getting into her car, Alexander standing on the sidewalk, and appellant getting into a gold Buick Regal.

Maida Rodas testified for the defense. On December 14, 2012, she was at the transit center to catch a bus. She came out of the bathroom and heard a gunshot. She turned and saw "a white guy," who "took off running." She also saw a man who had been shot. She then saw the white man run across the street in the direction of the canal. Rodas believed the white man was the shooter because he was standing really close to the man who was shot. She did not see anyone with a gun.

San Rafael Police Corporal Scott Ingels testified that he responded to reports of shots fired from the area of the transit center. He found a severely injured victim, whom he recognized as Khiry Jefferson, lying in front of a set of concrete benches. There was a great deal of blood pooling in the area and Jefferson, who appeared to be in shock, had a large wound on his right leg and his left arm was "upside down." A bystander had already applied a tourniquet to his leg. Medical aid arrived a short time later. Ingels spoke with Omari Cowens at the scene. Cowens was hesitant about providing any information, other than to say he and Jefferson were friends.

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[3] Drake is appellant's nickname.

[4] In her call to Golden Gate dispatch, Davis gave the dispatcher the last three digits of the car's license plate.

Police Officer Christian Diaz interviewed Travoy Meeks about an hour after the shooting. Meeks said that he saw Jefferson, who is his cousin, being shot. He told Diaz that the shooter was appellant. He said that he saw appellant enter the transit center, pull out a black pistol, and shoot Jefferson.

San Rafael Police Corporal Ronda Reese testified that she arrived at the transit center a short time after the shooting. Jefferson, whom she knew from previous encounters, had been shot in the right upper thigh and just above the elbow of his left arm. There was quite a bit of blood. Jefferson was conscious and said he did not see the shooter and did not know who would want to shoot him. The paramedics arrived and Jefferson told them he thought a small caliber handgun had been used. Reese searched Jefferson's clothing and did not find any weapons.

Laura Pak, a vascular surgeon at Marin General Hospital, testified that Jefferson arrived at the hospital with a life-threatening bullet wound to the upper thigh of his right leg, below the groin. Pak found that part of the artery in Jefferson's leg was destroyed and had to be replaced with a bypass. In addition, the adjoining "vein had about half of its wall completely obliterated. So there was a lot of blood coming from both areas." A person with such a wound could bleed to death within a half hour. There was also a bullet hole through the middle of Jefferson's upper arm, which contained a number of small bullet fragments.

Marin County Sheriff's Deputy Robert Mathis, testified that he was working at the county jail on June 27, 2012—less than 6 months before the shooting—when he saw Khiry Jefferson swing at someone out of Mathis's view. Mathis later observed that Marcus Dean, who is appellant's brother, had a bruise to his face, consistent with being punched. Other inmates, including Omari Cowens, also became involved in the altercation after Jefferson threw that first punch.

A few hours after the shooting, the gold Buick was located about a mile and a half from the transit center, in front of an apartment complex on Canal Street. The driver's door was ajar. The vehicle was registered to Corion Connors.

Later that day, two .40-caliber shell casings and two bullet fragments were found between two platforms at the transit center. A .40-caliber bullet projectile was also found 300 to 400 feet away from the location of the shooting. A search of the Buick yielded six Smith & Wesson .40-caliber unexpended ammunition rounds in the area of the rear seat. The rounds found in the Buick matched the shell casings found at the scene, based on the manufacturer's stamping on the rounds' casings.

Samantha Evans, an expert in the field of firearm and toolmark identification and comparison, opined that the two casings and the fired bullet "most likely" came from a Glock .40-caliber pistol, which is a semiautomatic weapon. The six unfired .40-caliber Smith & Wesson cartridges had the same manufacturer's stamp as the two fired casings and the fired bullet. The two bullet fragments were too small to be analyzed. She also testified that smoke or unburned powder particles can be emitted from the muzzle end of the barrel of a fired gun.

Corion Connors, the Buick's owner, testified that she and appellant were in an "on and off" relationship, but he was not her boyfriend on December 14, 2012.[5] The gold Buick was her car. On December 14, she had loaned the car to a family friend named Duke, but he never returned it.

San Rafael Police Sergeant Todd Berringer testified that he had reviewed surveillance videos from the day of the shooting. The videos showed appellant driving up in the gold Buick and parking across the street from the transit center. He got out of the car and appeared to be speaking with his mother, Kaiser Alexander. He then looked in the direction of the transit center and went inside the rear passenger compartment of the car, before jogging across the street and disappearing from view. About 20 seconds later, appellant reappeared in the video, jogging or running back to the car. Alexander again appeared briefly before appellant entered the driver's side of the Buick, backed the car up, and drove away.

[5] The parties later stipulated that appellant and Connors were in a dating relationship on December 14, 2012.

Berringer testified that, following the shooting, police seized cell phones, including Jefferson's phone. Police also obtained appellant's cell phone records, including text messages he sent and received from October to December 15, 2012. Almost 50 pages of text messages were admitted into evidence. Berringer testified about a number of those text messages, including texts from October and November that mentioned a .40-caliber Glock. Two texts from two days before the shooting mentioned "shells," which means bullets or casings, and a "clip," which is slang for a gun magazine. About 20 minutes before the shooting, appellant texted to an unnamed recipient, "WTF. You ain't here. Shit I said some niggas that jumped my little brah got at me."[6] Five minutes before the shooting, appellant texted Jefferson, "Where you at?" A minute before the shooting, Jefferson texted back, "A my nigga. Don't text me. Call me. I want to hear the killa in you bitch."

Berringer further testified that, in texts from immediately after the shooting, appellant tried to arrange a ride with his nephew, Stephen Dean, Jr., telling him to wait until dark. A text sent to appellant a day after the shooting said, "Wooooooow. That bitch only got hit in the leg." Appellant responded, "LOL. I know[!]" In the days after the shooting, appellant exchanged texts with people about the status of the police investigation. In one text to appellant, someone wrote, "They said they don't need the boy to testify because they have a lot of eyewitnesses. [¶] So without his testimony you would be charge[d] with attempted murder. [¶] Lose your phone blood. Real talk." In another text to Corion Connors, appellant texted, "Corrie you act like I was looking for trouble. They ran up on me two times [!]" Berringer believed this meant that appellant and the victim got into a fight. However, there was no evidence of a fight between Jefferson and appellant at the transit center that day.

On December 15, 2012, the day after the shooting, appellant had texted, "I need to get out of town." He was subsequently arrested in New Orleans, on February 11, 2013.

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[6] Berringer testified that he was aware of the incident that took place between Jefferson and appellant's brother, Marcus Dean, in the jail in June 2012.

DISCUSSION

I. *Petition to Disclose Juror Identifying Information*

Appellant contends the trial court abused its discretion and violated his constitutional rights to an impartial jury and due process when it denied his petition for juror identifying information to investigate a motion for new trial. Specifically, appellant observes that a computer disc (CD) containing unredacted text messages, not admitted at trial, was discovered in a laptop computer in the jury room after the trial had concluded. According to appellant, because those texts contained prejudicial material, he had good cause to inquire whether the jurors had in fact reviewed them during their deliberations.

A. *Trial Court Background*

The trial court held pretrial hearings with counsel to determine which of the text messages obtained from appellant's cell phone records were relevant and should be admitted during trial. Ultimately, a printout of some of the texts was provided to the jury with instructions that they comprised a portion of appellant's cell phone records and that only relevant texts were being admitted. Specifically, the court told the jury: "Folks, there were a lot more text messages than appear on this form, and you'll see gaps in time and so forth, but I spent considerable time with counsel in the past going over those and finding only those that had some relationship to this case. And so the ones that you will see are the ones that have been determined to have some relationship to this case.

"The exact evidentiary value is for you to decide, but these are the ones that I had decided appear to have some relevance to this case. Others were stricken, and they're just not there because it would be distracting to have umpteen pages of text messages that don't have anything to do with this case."

After the trial was over, defense counsel filed a petition for the release of juror identifying information to investigate a motion for new trial. The petition was based on information the prosecutor had provided to defense counsel and the court, informing them that People's Exhibit 64, a CD containing all of appellant's text messages, including texts that had not been admitted into evidence, had been discovered in a laptop computer

in the jury deliberation room.[7] Defense counsel requested the juror information in order to determine whether juror misconduct had occurred or, in the alternative, for the court to hold an evidentiary hearing on the issue.

The trial court held two hearings on the motion. At the first hearing, which took place on April 1, 2014, the court acknowledged that the unredacted CD had been left in the jury room and that it contained information not admitted at trial, but denied the motion to disclose juror information, without prejudice. The court described six files contained on the CD, including a tip sheet from Metro PCS, appellant's cell phone provider; a list of Metro PCS cell tower sites in California; search warrants used to obtain the phone records; text messages for a phone number not belonging to appellant; call records and cell tower data for appellant's phone number from October 2012 until December 2012; and, finally, text messages for defendant's phone number from those same dates. The court found that the defense had failed to show that any of the information contained on the CD was prejudicial to appellant, but gave defense counsel more time to review the CD and specify which information he believed was prejudicial. The court explained its ruling: "[B]ased on what is before me at this point, and I am not going to go through that CD and look at all four million entries or whatever it is, but if there is something particularly devastating, or prejudicial, that you believe they may have looked a lot [*sic*], I think you need to make that demonstration to me."

At the second hearing, which took place on May 5, 2014, defense counsel argued that many of the text messages on the CD contained prejudicial references to, inter alia, appellant having been in jail, his intent to commit armed robbery, his possession of stolen credit cards and checks, and his being involved in drug deals. The prosecutor responded that the file with the text messages for appellant's phone number contained many texts in very fine print, amounting to approximately 200 pages when printed out, in addition to

[7] Apparently, when the jurors began deliberations, the prosecution provided them with a "blank or wiped laptop to view evidence, and then later, at their request, a large flat screen TV and DVD player."

the five other files on the CD. The prosecutor also stated that a number of the texts regarding robbery opportunities and buying guns and ammunition had been admitted at trial.

When the court asked defense counsel how long it took him to look through all of the pages of text messages to decide which ones he wanted to include in his brief in support of the petition, counsel responded that it took "12 hours or so. I mean, it's obviously stuff that I knew I had seen already, I wasn't going to spend time reading every single one of them, I was looking for particular—you know, for certain types—of texts." Counsel also noted that he was looking at texts he had already seen, and "there's a thousand that I didn't mention . . . ."

The court again denied the petition, explaining: "Well, here's my take on this. I—as I approached it, I tried to look at it from the standpoint that if they had seen it, what—what is there in there that would have been so significant that it would have, in effect, derailed the jury from deciding the case?

"And in that respect, I also looked at the minutes and—and take judicial notice of these things: That the jury began their deliberations at about 3:00 p.m. on Friday, January 31st of this year, and they returned their verdict at 2:34 p.m. on Tuesday, which is the next Tuesday. So they deliberated for an hour or so on Friday, essentially the court day, from about 10:00 until 4:00 on Monday, and then from about 10:00 until 2:30 in the afternoon on Tuesday.

"I also—at some point, I recalled putting the CD, People's No. 64, in a computer, my own, I believe, and looking at it, and was immediately overwhelmed by the amount of data that is in it. And as I went through the brief and I looked through—actually what was marked as Court's Exhibit 1, which was a compilation that categorically separated all of the texts, and these were the ones that—I think they were all marked, because you had marked on your copy of that Mr. Shaiken [defense counsel], the areas that you were objecting to under [Evidence Code, sections] 356 or 352, or whatever, and I did find, in reading through that—it was also, I have to say, the same as looking through the CD, it was incredibly boring, because they're just numbers, there's no names, you have to really

pay a lot of attention to figure out who's writing to whom, or who's receiving the record—the message from whom.

"And given that this is a—an attempted murder case, in which there were, I believe, two eyewitnesses who had known [appellant] from before that date and identified him as the shooter, and the shooting was, you know, very bloody and un—not easy to look at, but that was what the case was about, and I looked at all of the things that you put attached to your brief, and so for our purposes here, I assume that the jury may have seen some of that, but I don't think they would be able to do the analysis that you did and still deliberate on the case.

"And, frankly, whether they may have run across something that [appellant], perhaps, had a conversation about with somebody else, no matter which way the conversation went, whether it dealt with guns in general, drug dealing, house invasion or assaults, and, frankly, most of the time in reading those messages, the language that is used is not the conversational language that we use here in the courtroom, it is often difficult to understand, as a matter of fact, I think the People called a—a witness to, in effect, translate some of the language that he was familiar with in some of the e-mails that were at issue here.

"But my point is that the evidence of [appellant's] guilt, I think, was pretty overwhelming, and so even if they were able to decipher the messages and assign them correctly as either something [appellant] sent or something he got, I really think it's inconsequential. I just don't see how that could have derailed their attention to the evidence in the case. I don't really believe that they did view that, but I don't think it's incumbent upon the court to answer that question, because even if somebody did—and we're not allowed, as you mentioned a moment ago, to go into what the effect of something was on them—I don't think, if they read it, if they looked at it, it is clear to me that given the timing, they could not have really considered it.

"And this jury was attentive, they knew what the rules were, we went over them so many times that I just don't think, assuming for the purposes of looking at this, they could have looked at it, I just don't think it is that meaningful or monumental that it

would warrant pulling one or all 12 of them back into court and asking them questions about it. So, I'm going to deny the motion to disclose confidential juror information for those reasons."

B. *Legal Analysis*

Code of Civil Procedure sections 206 and 237 govern the disclosure of juror information in a criminal trial. At the conclusion of a trial, the trial court is required to seal the court's record of personal juror identifying information, including names, addresses and telephone numbers. (Code Civ. Proc., § 237, subd. (a)(2).) Following trial, a defendant may "petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).)

"The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for a hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure." (Code Civ. Proc., § 237, subd. (b).) "Good cause" is a showing sufficient "to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.)

"In amending section 237 in 1995, the Legislature declared: 'The Legislature finds and declares that jurors who have served on a criminal case to its conclusion have

dutifully completed their civic duty. It is the intent of the Legislature in enacting this act to balance the interests of providing access to records of juror identifying information for a particular, identifiable purpose against the interests in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system.' (Stats. 1995, ch. 964, § 1, quoted in Historical and Statutory Notes, 13 West's Ann. Code Civ. Proc. (1999 pocket supp.) foll. § 206, p. 150.)" (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1096 (*Townsel*).) " 'Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information as a matter of right in each case.' [Citation.]" (*Id.* at p. 1094, quoting *People v. Rhodes, supra,* 212 Cal.App.3d at pp. 551-552.)

We review the trial court's denial of a petition filed pursuant to Code of Civil Procedure section 237 for an abuse of discretion. (*Townsel, supra,* 20 Cal.4th at p. 1097; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

Here, we conclude the trial court did not abuse its discretion when it found that appellant failed to make a prima facie showing of good cause. First, in ruling on the petition for juror identifying information, the court described its own experience of looking at the CD, which contained six different files: "[I] was immediately overwhelmed by the amount of data that is in it." The court also said that, when it had looked through the compilation of text messages that the defense wanted excluded from evidence, "I did find, in reading through that—it was also, I have to say, the same as looking through the CD, it was incredibly boring, because they're just numbers, there's no names, you have to really pay a lot of attention to figure out who's writing to whom . . . ." The court also questioned whether the jurors would have had time to look through the immense amount of data on the CD, find the 200 pages of text messages, figure out which were appellant's texts, decipher the language used in the texts, and find and read the objectionable ones, while still managing to sort through all of the other evidence and issues to reach a verdict. With respect to that question, the record shows that defense

counsel told the court that it took him some 12 hours to go through the text messages on the CD, even though "it's obviously stuff that I knew I had seen already, I wasn't going to spend time reading every single one of them, I was looking for particular—you know, for certain types—of texts," amongst the "thousand that I didn't mention."

Based on the trial court's calculations, the jury deliberated for approximately 11 and one-half hours over three days. Thus, even assuming the jurors became aware of the file on the CD containing the texts,[8] we agree with the trial court that, it is highly unlikely that "they would be able to do the analysis that [defense counsel] did and still deliberate on the case." It is nearly impossible to imagine that they could have sifted through the many pages of texts, while also reviewing all of the other evidence and attempting to reach a verdict during the limited amount of time in which they deliberated.

The trial court also observed that the language used in the texts "is not the conversational language that we use here in the courtroom, it is often difficult to understand, as a matter of fact, I think the People called a—a witness to, in effect, translate some of the language" of the texts. One brief example of a text message exchange that defense counsel described in his petition as a "[r]eference to possible robbery plan using guns," demonstrates the court's point. First, a text from one phone number read, "Got lick big one need more thangs[.]" The responsive text read, "How many i got one 4sho wus gud im ready bra[.]" Again, it is simply unrealistic to suppose that the jurors would have had the time and inclination to read through hundreds of pages of similar texts, or that they would have been able to find and decipher the problematic ones mixed in with the rest.

Finally, the trial court commented on the attentiveness of the jurors, who knew what the rules were after the court went over them "so many times." This would include the court's instruction to the jury that the text messages admitted into evidence were "the

[8] Midway through its deliberations, the jury requested a "larger video screen (or TV) monitor to view video evidence all together." The jury received the requested video equipment shortly thereafter. It is thus not clear from the record whether the jury ever used the laptop computer in which the CD in question was found.

ones that I had decided appear to have some relevance to this case. Others were stricken, and they're just not there because it would be distracting to have umpteen pages of text messages that don't have anything to do with this case." Before it began deliberating, the court also instructed the jury that " '[e]vidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence." We presume the jury followed these instructions. (See *People v. Boyette* (2002) 29 Cal.4th 381, 436 ["trial court properly instructed the jury on the law, and we presume the jury followed those instructions"].)

The trial court also found that that, even if the jury had been able to decipher all of the texts, "the evidence of [appellant's] guilt, I think, was pretty overwhelming," and "I really think it's inconsequential. I just don't see how that could have derailed their attention to the evidence in the case." The court then reiterated, however, that it did not believe that the jury did view the text messages or that, if they did look at them, "it is clear to me that given the timing, they could not have really considered it." Because we agree, for all of the reasons discussed, that the possibility that the jury actually could have read and considered the problematic texts, even had it attempted to do so, is quite remote, we need not address the court's secondary finding regarding the possible effect on the jurors had they in fact read those texts.[9]

In sum, appellant did not make a showing sufficient "to support a reasonable belief that jury misconduct occurred" (*People v. Rhodes*, *supra*, 212 Cal.App.3d at p. 552), and

[9] We do, however, observe that the evidence of guilt in this case was extremely strong, which would make it all the more unlikely that the jurors would have been influenced by the texts, even had they read them. (Cf. pt. II., *post*.) Appellant observes that the jury asked the court a question about the need to find an intent to kill. But this does not suggest, as appellant argues, that "one or more jurors considered the evidence of intent to kill to be lacking." The jury asked whether intent can be "implied by actions alone or [whether] we need to know what the person was thinking." The court told the jury to look at the intent instruction. (See CALCRIM No. 252.) We do not believe this question shows that the jury was doubtful about whether appellant had intent to kill. Instead, it shows that it simply wanted to clarify whether it was permissible to ascertain appellant's intent from his actions.

the court did not abuse its discretion when it denied the petition for juror identifying information. (See Code Civ. Proc., § 237, subd. (b); *Townsel, supra,* 20 Cal.4th at p. 1097; *People v. Carrasco, supra,* 163 Cal.App.4th at p. 991.)[10]

II. *Sufficiency of the Evidence of Intent to Kill*

Appellant contends the evidence of intent to kill was insufficient to show that he harbored such an intent, as needed to support the attempted murder conviction. According to appellant, "[a]lthough he could have chosen to shoot Jefferson in the chest or head, and thereby inflict a certain mortal wound, he instead shot Jefferson in the leg."

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*).)

The mental state for attempted murder " 'requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.] . . . [Citation.] [¶] Intent to unlawfully kill and express malice are, in essence, 'one and the same.' [Citation.] . . . Express malice requires a showing that the assailant ' " 'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' [Citation.]" ' [Citations.]" (*Smith, supra,* 37 Cal.4th at p. 739.)

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[10] In light of our conclusion that the trial court did not abuse its discretion in denying the petition for juror identifying information, we need not address appellant's related claim that the court's ruling violated his constitutional rights to an impartial jury and due process. "Since there was no abuse of discretion 'there is thus no predicate error on which to base [appellant's] constitutional claims. [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395.)

In *Smith*, the California Supreme Court discussed the principles of law that inform a reviewing court's inquiry as to whether a defendant could properly have been convicted of attempted murder. The court explained that "the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive . . . is not dispositive, although again, where motive is shown, such evidence will usually be probative of intent to kill. Nor is the circumstance that the bullet misses its mark or fails to prove lethal dispositive—the very act of firing a weapon ' "in a manner that could have inflicted a mortal wound had the bullet been on target" ' is sufficient to support an inference of intent to kill. [Citation.] Where attempted murder is the charged crime because the victim has survived the shooting, this principle takes on added significance." (*Smith*, *supra*, 37 Cal.4th at p. 742.)[11]

In the present case, we find there is substantial evidence in the record to support appellant's conviction for attempted murder. First, the evidence shows that appellant shot Jefferson twice at close range, from between three to five feet away. That Jefferson was hit in the upper right leg, near the groin, and in the left arm above the elbow does not show, as appellant asserts, an intent to merely wound Jefferson. (See *Smith*, *supra*, 37 Cal.4th at p. 741 [" ' "Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind" ' "].) Rather, it shows that appellant fired his gun " ' "in a manner that could have inflicted a mortal wound had the bullet been on target," ' [which] is sufficient to support

[11] In *Smith*, the defendant was standing behind a car when he fired a single bullet into the car, narrowly missing both the female driver and a baby sitting in a car seat directly behind the driver. (*Smith*, *supra*, 37 Cal.4th at pp. 736-737.) The defendant appealed his conviction for the attempted murder of the baby, arguing that, while there was proof of specific intent to kill the driver, there was insufficient evidence of his specific intent to kill the baby. (*Id.* at pp. 736, 738.) Our Supreme Court found that the evidence "that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both." (*Id.* at p. 743.)

an inference of an intent to kill." (*Id.* at p. 742.) Indeed, the evidence shows that the wound to Jefferson's leg from the off-target bullet very nearly *was* mortal.

In addition, the record reflects that appellant had a motive to kill Jefferson, which is quite probative of an intent to kill. (See *Smith*, *supra*, 37 Cal.4th at p. 742.) The evidence shows that Jefferson had previously assaulted appellant's brother in jail. Thereafter, appellant obtained a .40-caliber Glock handgun and ammunition. He also exchanged hostile text messages with Jefferson shortly before the shooting. He then drove to the transit center, apparently for the sole purpose of shooting Jefferson with the handgun at close range, before fleeing.

In light of all of the circumstances surrounding appellant's shooting of Jefferson, there plainly was substantial evidence of intent to kill to support the attempted murder conviction. (See *Smith*, *supra*, 37 Cal.4th at pp. 738-739.)

III. *Denial of the Motion to Dismiss a Prior Strike Conviction*

Appellant contends the trial court abused its discretion when it denied his motion to dismiss a prior strike conviction.

A. *Trial Court Background*

Defense counsel moved to dismiss appellant's prior strike conviction for robbery, pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 and section 1385. Counsel argued, in particular, that appellant committed the strike offense at the young age of 18 and that he grew up with no guidance or support from his parents.[12] The prosecutor opposed the motion.

The probation report described appellant's prior offenses, both as a juvenile and an adult. His juvenile offenses included possession of a knife on school grounds, tampering with a vehicle, punching his teacher in the face and stealing his wallet, and armed robbery. His adult criminal record included the 2007 strike conviction for robbery, along

[12] Counsel described appellant's mother as a "street person" who frequented the transit center.

with a grand theft conviction, when he was 18 years old.[13] His record also included a 2010 conviction for receiving stolen property and several probation violations. Appellant was 24 years old and on parole when he committed the present offenses.

At appellant's sentencing hearing, the trial court denied the motion to dismiss his prior strike conviction, explaining: "In this instance, I don't quarrel with the notion that it appears to me, from what I've been able to read and understand about [appellant's] background, that life—probably more people than we would like to recognize sometimes do not have a healthy home life. They don't have parents who are careful enough and spend the time enough to help guide and direct them, and that may well have been the situation for [appellant] for a good part of his life. But I would also be willing to wager, if I were a wagering person, that there are other people in this room who have had similar upbringings with similar deficits in their lives, and they don't do the things that [appellant] has done.

"He, from what I can tell, including the writing that he submitted today, he is a relatively intelligent person and is able to make decisions, good, bad and indifferent. And I don't think that that upbringing or having his mother, as she apparently is, not very helpful to him and hasn't been very helpful for quite some time, it appears, but I don't think that that is enough to persuade me that the strike should be stricken.

"As the People point out and as the probation department points out, from his youthful days he has committed crimes that have been very serious. And even as an adult—he's a young man still, but as an adult some of the crimes that he has committed, including this one, are severe and serious and violent. And it seems to me in considering the background of the defendant, I do consider the things that have been urged by the

[13] In her opposition to the motion, the prosecutor described the prior strike conviction, in which appellant "was accused of two robberies over the course of a few days. In one, he robbed a woman of her iPod and sunglasses by punching her in the head from behind, knocking her down, and holding her down while he stole her belongings. In the other, he punched a male victim in the eye, knocking him to the ground, and demanded his money. [Appellant] stole the victim's wallet, containing $22, the victim's ID card, and credit cards."

defense, as well as by the People. But it seems . . . to me, as the People argue, that [appellant] falls squarely within the three strikes law. In the case, this is a second strike, so it's not a life term, but it is a significant term that could be imposed.

"I don't think there is a basis. I don't think it would be in the interest of justice, based on all that I knew from both the trial and everything else that counsel have submitted to me. I do not think it would be in the interest of justice to strike the strike allegation. As a matter of fact, I think it would be against the interest of justice to do so. So I would deny the motion to strike the prior."

The trial court subsequently sentenced appellant to a total term of 47 years in state prison.

B. *Legal Analysis*

Under section 1385, subdivision (a), a judge " 'may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.' " In *Romero, supra*, 13 Cal.4th 497, the California Supreme Court " 'held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, "in furtherance of justice" pursuant to . . . section 1385(a).' [Citation.] [The court] further held that '[a] court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is' reviewable for abuse of discretion. [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*), quoting *People v. Williams* (1998) 17 Cal.4th 148, 158.)

Following *Romero*, our Supreme Court in *Carmony*, *supra*, 33 Cal.4th at page 374, addressed whether a trial court's decision *not* to dismiss a prior strike conviction pursuant to section 1385 is reviewable for abuse of discretion, and concluded "that a court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." The court then explained that, "[i]n reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the

trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, at pp. 376-377.)

The *Carmony* court described the "stringent standards that sentencing courts must follow in order to find such an exception, including the consideration of " 'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.] [¶] Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.

"In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss . . . . [¶] But '[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citations.] [Citation.] Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable

people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony, supra*, 33 Cal.4th at pp. 377-378.)

In the present case, appellant argues the trial court abused its discretion in failing to dismiss the prior strike conviction due to his youth at the time he committed that offense; his difficult upbringing; and the fact that he would still serve a very long sentence of 38 years, which includes a five-year enhancement based on the prior strike conviction, if the court had granted his *Romero* motion.

The trial court's detailed explanation of its denial of the *Romero* motion demonstrates that it examined the nature and circumstances of both the present convictions and appellant's prior criminal history, as well as his " 'background, character, and prospects.' " (*Carmony, supra*, 33 Cal.4th at p. 377.) There is no evidence that the court was "not 'aware of its discretion' to dismiss" or that it "considered impermissible factors in declining to dismiss" the prior strike conviction. (*Id.* at p. 378.) Instead, it is clear that the court thoughtfully considered all of the relevant circumstances before concluding that appellant's situation was not so extraordinary as to fall outside the spirit of the three strikes scheme. (See *ibid.*) We find no abuse of discretion. (See *id.* at p. 373.)

DISPOSITION

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Richman, J.

_____
Miller, J.

People v. Dean (A142658)